



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

AEG

Docket No. 2727-00

24 August 2000

Mr. [REDACTED]

Dear Mr. [REDACTED]:

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10, United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 22 August 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary evidence considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The Board found that you graduated from high school in 1992. In May 1993 you completed the course of instruction at the Naval Academy Preparatory School, however, due to a knee injury necessitating surgery, you were ineligible for an appointment to the Academy at that time. Consequently, you enrolled in a community college in the fall of 1993. You then received an appointment to the Academy and began midshipman service in the summer of 1994.

In connection with your appointment as a midshipman you executed an agreement pursuant to the provisions of 10 U.S.C. §§ 6959 and 2005, in which you stated that you would complete the course of instruction at the Academy. You also acknowledged that failure to do so could result in orders to active duty in an enlisted status or a requirement to reimburse the government for the cost of your education if you "voluntarily or because of misconduct" failed to complete a specified period of active duty.

During your fourth class year, you played junior varsity football in the Fall and participated in Spring practice with the varsity. Unfortunately, by the end of that year, you had failed chemistry

and your academic average was computed at 1.78 (4.0 scale). Although you were referred to the Academic Board, retention at the Academy was directed, apparently due to favorable recommendations from the company officer and several instructors, and your enrollment in summer school.

During the first semester of the third class year, in September 1995, you were 12 pounds overweight. In November 1995 you were advised that deficiencies in physical education could result in referral to the Academic Board. It does not appear that such action was taken at that time, but the Academic Board did review your case again in May 1996 due to a course failure in navigation. You also received a grade of "D" in military performance for the second semester of this year. However, the Academic Board once again retained you, despite an overall grade point average of 1.97.

You spent part of the 1996 summer aboard USS JOHN HANCOCK (DD 981) and were rated 8th of 24 midshipmen assigned. You also attended summer school and raised your overall grade point average to 2.25. Available documentation indicates that your record was reviewed by a military performance board in August 1996, at the beginning of your second class year, and you were again retained at the Academy.

On 24 September 1996 you were 36 pounds overweight and exceeded the permissible percentage of body fat by two percent. Accordingly, you were required to weigh-in weekly, participate in a program of remedial conditioning and lose four pounds per month. On 12 December 1996 you received an evaluation for the period 16 August to 17 December 1996 in which the midshipman company commander assigned six marks of "2.0" (Met Standards) and three marks of "3.0" (Above Standards), but also assigned a mark of "D" in military performance and rated you in the bottom 25% of the company. The company commander commented that although you had improved the physical readiness test grade from unsatisfactory to "C," you were issued a letter of instruction (LOI) on 3 September 1996 and "to date, has not yet met the LOI's requirements (academics)." When the company officer reviewed this report, he lowered four of the 2.0 marks and one of the 3.0 marks to "1.0" (Below Standards).

Your academic problems recurred in the first semester of the second class year when you failed the introductory course in fundamental electrical technology. In other courses, you received a "B" two "C's," and a "D," resulting in a semester grade point average of 1.47 and lowering your cumulative average to 2.11. Because of your course failure and semester grade point average, Academic Board action was again initiated. In conjunction with such action, input was received from several of your instructors. Their evaluations showed that you stood at the foot of four classes and, in the other course, you were ranked 18th out of 23 students. The evaluations contained comments such as "clearly unsuitable," "I am not at all optimistic about

(your) future . . . in the Naval Service," "he needs an 'adjustment' in order to get his priorities straight," and "his work ethic needs a thorough overhaul." Only one instructor submitted anything close to a positive evaluation, commenting that your "commitment to do better in the classroom and in professional matters shows me that he wants to do better and succeed at the Naval Academy."

The company officer also submitted an evaluation to the Academic Board in which he recommended separation from the Academy and justified that recommendation, in part, as follows:

. . . (You are) a substandard midshipman. He requires constant supervision. He clearly lacks the dedication and self discipline required of an average midshipman. He does not seek the help of his professors and does not prioritize his tasking. He required maximum effort from the chain of command this semester. He was issued a (letter of instruction) from a company performance board, put on report twice for minor offenses, maintained irregular attendance at mandatory conditioning squad . . ., was the last midshipman in (your company) to pass the (physical readiness test) . . . I received numerous complaints from his instructors regarding his poor comportment in the classroom. In summary, (you), despite repeated attempts by the chain of command, (have) not demonstrated the minimum skills required to manage his basic responsibilities.

The record reflects that upon initial consideration of your case, the Academic Board voted for separation from the Academy. On 3 January 1997 you requested reconsideration, stating that "I realize my performance as a midshipman has been substandard over the past semester. I have had problems in academics, physical education and performance." You then contended that there had been improvement in these areas and stated as follows:

. . . I made many mistakes this semester. Some were honest and others were just carelessness. However, most stemmed from a feeling of false safety and a lack of self-motivation. Often I needed someone to push me to do well. The combination of my effort and someone else's encouraging push were responsible for my successes this semester. Once I began to do better and head in the right direction, I would get comfortable with what I had accomplished and decrease my efforts. Basically, my effort was inconsistent, and . . . so were my results.

You also acknowledged that "as a leader it is my responsibility to give maximum effort at all times . . .", and that "the reality of being separated and not becoming a naval officer has motivated me more than ever. I will do all it takes to succeed here . . ." The reconsideration request was submitted through the company officer, who wrote that "(Your) statement accurately summarizes his performance this semester."

On 6 January 1997 the Academic Board met to hear your appeal of its previous decision. You told the Academic Board that in order to come to the Naval Academy you underwent knee surgery and rehabilitation, and then needed such surgery again in your fourth class year after a football injury. You then spoke about your academic problems, efforts to overcome those problems, and your "commitment" to succeed. The senior member then noted your comment to the effect that you had become comfortable with your accomplishments and decreased your efforts, and opined that such an attitude did not manifest the commitment to which you referred. You then admitted to letting things slide and needing to "fight to get back to the top." When the senior member called on him for comments, the company officer again recommended your separation from the Academy. He said that you had "gone up and come back down," characterized your progress in the physical fitness and weight control program as "hot and cold," and said that he had to keep you in this program to ensure progress. The company officer stated that you lacked motivation, were "not a take charge guy," and had no future in the Naval Service. The company's senior enlisted advisor was also called on for comments, and said he would not be comfortable having you as his division officer and characterized you as a "bad virus" and a negative leader. In final comments to the Academic Board, you stated that you had a plan to fix your problems, and had spoken with the company officer and senior enlisted advisor. You promised to take the physical readiness test once a month and get extra instruction in any class if your standing fell below a certain percentage. You also said that you would maintain a "positive aura" on leadership and "do the best I can." After polling the other members, the senior member announced that the Academic Board adhered to its earlier decision to separate you from the Naval Academy.

On 13 March 1997 the Superintendent of the Academy forwarded to the Secretary of the Navy (SECNAV) the Academic Board's actions for academically deficient midshipmen in the first semester of the 1996-97 academic year. In his letter, the Superintendent noted that "the Academic Board is authorized to waive the active duty obligation imposed as a payback . . . for midshipmen disenrolled for academic . . . deficiencies if it determines that the midshipman was deficient 'despite determined efforts.'" Attached to the Superintendent's letter was the Academic Board's recommended disposition for those midshipmen who were recommended for discharge. Your disposition recommendation reads as follows:

Recommend monetary recoupment in the amount of \$57,729.72. GPA 2.11; four unsat semesters. Poor attitude and military performance. (You request) a waiver of active enlisted service.

Enlisted service or reimbursement was recommended for five other midshipmen who were to be discharged. The disposition recommendation in two other cases reads as follows:

Discharge from Naval Service. Recommend waive the . . . fleet service and/or monetary recoupment of tuition costs. Although academically deficient, it is the Academic Board's judgment that he gave a determined effort.

Waiver was recommended in another case because of a medical condition that could have contributed to the midshipman's academic deficiency.

On 27 March 1997 the Chief of Naval Personnel (CNP) favorably endorsed the Superintendent's letter, forwarded it to SECNAV for final action, and recommended that you "fulfill (your) obligation via recoupment vice active enlisted service." On 4 April 1997, acting for SECNAV, the Assistant Secretary of the Navy for Manpower and Reserve Affairs (ASN/M&RA) approved the foregoing recommendation. Accordingly, on 14 April 1997 you were discharged from the Academy and the Naval Service.

The Board found no merit to your contention that prior to the final Academic Board proceedings, the company officer and senior enlisted advisor made misleading statements to the effect that they would recommend your retention at the Academy. The record contains no evidence to support this contention, and you have submitted none. The Board did not believe that the company officer would have told you that he favored your retention after markedly downgrading the evaluation you received on 12 December 1996. That evaluation should have put you on notice that the company officer would not be particularly supportive. The Board also noted that at the Academic Board hearing, you never contended that the company officer or senior enlisted advisor misled you in any way, even after both officials orally recommended your separation. On a related issue, the Board found that it was proper for the company officer to inform the Academic Board of your prior problems with weight control and academics. In this regard, he also stated that you eventually met the weight standards, and the documentation before the Academic Board would have set forth your entire academic record. In short, the company officer did not misrepresent or exaggerate any of your past difficulties.

The Board also found no merit to your contention that reimbursement could not be directed in your case since the Academic Board did not make a finding that you failed to make a determined effort. The agreement you executed at the time of your appointment states that failure to complete the course of instruction at the Academy could result in enlisted active duty. Alternatively, if you failed to complete a period of active duty voluntarily or due to misconduct, you could be required to reimburse the government for educational expenses. However, paragraph 9 of SECNAV Instruction (SECNAVINST) 1531.1A and Article 3640415.1g of the Naval Military Personnel Manual (MILPERSMAN) state that the enlisted service requirement may be waived if the Academic Board determines that the academic

deficiency occurred "despite determined efforts by the midshipman." Accordingly, enlisted service or monetary reimbursement is directed unless the Academic Board finds that such an effort has been made. A specific contrary finding, that such an effort was not made, is not a prerequisite for enlisted service or reimbursement. Since the Academic Board did not find that you made a determined effort, enlisted service or reimbursement was appropriate in your case. Additionally, as you point out, you essentially admitted to the Academic Board that you had made no such effort.

The Board also concluded that it was not unfair to direct reimbursement based on academic deficiencies during your second class year even though you could have resigned or been discharged until the end of your third class year without a requirement for enlisted service or reimbursement. Along these lines, the Board noted your contention that you actually improved your academic performance and physical fitness in the first semester of your second class year. However, the company officer stated that you met the physical fitness and weight requirements only after a prolonged period in a remedial program, during which your performance was uneven, and that such improvement would not have occurred had you not been in the program. Additionally, although your academic average at the time of the Academic Board action was somewhat better than it was at the end of the spring semester of your third class year, it had declined during the first semester of your second class year after your excellent performance in summer school. Consequently, the Board concluded that there was no significant improvement in your academics or physical fitness. Further, you obviously did not desire to resign or be discharged immediately prior to the beginning of your second class year, given your excellent performance in summer school and on your summer cruise.

The Board also rejected your contention that it was unfair to direct reimbursement of an amount based on all five semesters and not just the first semester of your second class year. The amount of reimbursement is routinely based on the entire period of service at the Academy, and not just the period after beginning the second class year. Additionally, although you were separated based on academic problems that occurred only during the first semester of our second class year, your academic performance was marginal throughout your tenure at the Academy.

The Board also rejected your attempt to analogize your case to more recent cases in which the reimbursement requirement was waived. For instance, although the 24 midshipmen discharged from the Academy in 1994 for cheating were not required to serve in an enlisted status or reimburse the government for educational expenses, waivers were granted only because the investigation concerning the cheating scandal took so long. Further, senior Navy officials cautioned that such action "should not be looked at as something that will happen again in the future." John Fairhall, *Final Decision Made: 24 Mids to be Expelled*, Baltimore

Sun, Apr. 29, 1994, at 1B, 9B. Accordingly, the Board concluded there was only a tenuous connection between these cheaters and you.

In another case, the Board recommended that a former midshipman be relieved of the reimbursement requirement, but that recommendation was later disapproved by ASN/M&RA. Another individual initiated action in Federal court after the Board denied relief, and the case was settled favorably to the individual. Nevertheless, the Board was aware that cases are settled for a variety of reasons, and did not believe that such action should serve as a precedent. Finally, although there was another case in which an individual was relieved of a requirement to reimburse the government even though he was discharged from the Academy for using LSD, the Board determined that the waiver action resulted from political considerations, and concluded that this case should not be viewed as setting a precedent that should be followed.

Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of a probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Copy to:
Mr. William M. Ferris